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JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 474

LEVON A. AKOPIANTZ, *Petitioner*

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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SUBJECT INDEX

	Page
Order of Supreme Court of California	1
Decision and Opinion of District Court of Appeal, State of California, First Appellate District	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Statutes Involved	9
Reasons Relied Upon for Allowance of the Writ	12
Argument	13
Conclusion	21

Appendix:

Order of California Superior Court Denying Hearing	1a
Opinion of the District Court of Appeal No. 19,018	2a
Opinion of the District Court of Appeal No. 16,962	15a
Order of District Court of Appeal Denying Petition for Rehearing	22a
Letter from Robert W. Kenny, Attorney-General, to Fred N. Scatena, M.D.	22a
Order Extending Time to File Petition for Writ of Certiorari	24a

AUTHORITIES

Cases

Aitchison v. State, 105 A 2d 495, 204 Md. 538	20
Akopiantz v. Board of Medical Examiners, 146 C.A. 2d 331	9
Akopiantz v. Board of Medical Examiners, 190 A.C.A., 114	2, 9, 21

Page

Lawrence v. Briry et al, Board of Regulation in Medicine, 132 N.E. 174, 239 Mass. 424 20
Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 77 S. Ct. 752 ..... 2, 20
Yick Wo v. Hopkins, 118 U.S. 356 ..... 2, 12, 19

STATUTES

28 United States Code, Section 1957(c) 2

California Business and Professions Code:

Section 2165 9
Section 2190 9
Section 2193 9
Section 2310 8
Section 2316.5 11
Section 2320 10
Section 2321 10

16 California Administrative Code:

Section 1330(f) 10

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment 2, 20

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Levon A. Akopiantz, Petitioner, prays for the issuance of a writ of certiorari to review an Order of the Supreme Court of California, filed May 10, 1961, without Opinion (Appendix, page 1a), denying Petitioner's Petition for hearing after decision March 15, 1961, by the District Court of Appeal, State of California, First Appellate District, Division One, and numbered 1 Civil No. 19,018.

The Opinion of the District Court of Appeal appears in the Appendix, pages 2a-14a, and also in the Record, and is reported 190 Advance California Appellate Reports 114.

JURISDICTION

Jurisdiction to review this cause upon writ of certiorari is conferred upon this Court by 28 United States Code, Section 1957(c), the Supreme Court of California being the highest Court of that State, and Petitioner's rights and privileges under the Fourteenth Amendment to the United States Constitution being drawn in question.

By Order of August 7, 1961, signed by the Honorable William J. Brennan, Jr., Associate Justice of this Court, the time within which Petitioner could apply to this Court for writ of certiorari to review aforementioned Order of the Supreme Court of California was extended to and including October 7, 1961. The Order of Mr. Justice Brennan is carried in the Appendix, page 24a.

QUESTIONS PRESENTED

Has Petitioner been denied the Constitutional guarantees of Due Process and Equal Protection of the Law?

Has the action of Respondent Board toward Petitioner been invidiously discriminatory, within the condemnation of *Yick Wo* v. *Hopkins*, 118 U.S. 356, and *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232?

Are statutes unconstitutional which allow a State medical licensing agency, through its failure to supple-

ment a vague statutory standard of "quality" with reasonable rules to measure quality, to deal with similarly qualified applicants on an unequal and arbitrary basis, or which allow such agency the facility to discriminate against a whole class of American citizens, namely graduates of competent foreign medical schools?

Are statutes unconstitutional which allow any form of invidious discrimination in State medical licensing?

STATEMENT OF THE CASE

(a)

Petitioner is, and at all times herein has been, an American citizen. He attended high school in New York State, and following graduation matriculated at New York University, from which he thereafter received the degree of Bachelor of Science. (Ex. A, pages 5, 6). Prior thereto, in June 1936, he was granted approval by the University of the State of New York of his application for a medical qualifying certificate, and later was advised by the New York State Board of Medical Examiners that if he also pursued and completed the course of study at St. Mungo's College of Medicine (Glasgow, Scotland), he would be eligible for admission to the New York State medical licensing examination. (Ex. A, page 6)

Petitioner then attended St. Mungo's College of Medicine, from October 1, 1936, to June 1937, and then the Anderson College of Medicine (Glasgow, Scotland), from October 1, 1937, to June 30, 1938. (Ex. A, page 7) These Colleges are extra-mural schools, so-called, not being integrated with a Univer-

sity, and as they did not award degrees, and as Petitioner desired to have a degree in medicine, intending to practice in the United States, he transferred to Cambridge University (England) which awards such degrees, and pursued medical studies there from October 1, 1938 to June, 1939. He was unable to return to England from the United States in the fall of 1939 because War had broken out, and passports were not issued for areas of combat which included Great Britain. In consequence he transferred to the University of Lausanne (Switzerland), and attended there from March 1940 to June, 1941, completing the medical course, and receiving the degree of doctor of medicine from that institution on June 27, 1941. Ex. A, pages 6-8, 29, 30)

Upon entrance at that University, Petitioner's prior medical training at the above two Scottish Colleges and at Cambridge University was evaluated, and he was given nine semesters advanced standing, with total hourly credits of 2423. (Ex. A-16). The Certificate of Medical Education given to him by the University of Lausanne provided in part:

> "Lausanne University extended full credit and approval and accepted all his [Petitioner's] previous medical studies and examinations taken prior to his transfer to Lausanne University, and recognized these as being quantitatively and qualitatively equivalent to those given by Lausanne University. . . ." (Ex. B-22, page 1)

(b)

After being graduated from the University of Lausanne, Petitioner returned to the United States, where he thereafter received the following resident training

in hospitals approved for the training of interns and residents:

> Lincoln Hospital (rotating internship), December 10, 1941 to September 15, 1942
>
> Starling-Loving Hospital, Ohio State University (assistant residency in surgery), October 1, 1942 to July 1, 1943
>
> Metropolitan Hospital (residency in thoracic surgery), July 1, 1943 to December 31, 1943
>
> Bellevue Hospital (residency in chest surgery), July 1, 1944 to December 31, 1945
>
> Jewish Memorial Hospital (residency in pathology), October 1947 to June 1948
> (Ex. A, pages 10, 11, 29)

Petitioner's training has been accepted as fulfilling the requirements for certification as a specialist by the American Board of Surgery, the American Board of Thoracic Surgery, and the American College of Surgeons. (Ex. A, page 22) He has received an original commission as Major in the Medical Corps of the United States Army, (Ex. A, page 22) and has had specialized medical contributions published by accepted and accredited professional publications, including the following:

The Journal of International College of Surgeons ("Lung Resection in Bronchiectasis", Vol. X, No. 2, March-April, 1947). (Ex. B-25)

The *American Journal of Surgery* ("Improved Needle Holder", Vol. IXX, No. 1, October, 1948). (Ex-B-26)

The Journal of the International College of Surgeons, Vol XXII, No. 5, November, 1954 ("Cardi-

opericardiopexy in the Surgical Treatment of Myocardial Ischemia", written in collaboration with Dr. Samuel A. Thompson, Associate Professor of Surgery at New York Medical College). (Ex. B-27)

In 1936, 1940, and 1942, the National Board of Medical Examiners approved Petitioner's form of medical training (Exs. B-9, B-10, B-11), and on March 1, 1944, the Secretary of the Bureau of Qualifying and Professional Examinations, State Education Department, University of the State of New York, wrote him as follows:

> "Your credentials from Scotland and Switzerland have been evaluated as entitling you to four years of approved medical study . . ." (Ex. B-7)

Petitioner served as Director of Surgery at the National Shenyang Medical Hospital in Mukden, China, prior to 1949 (Ex. A, pages 13, 28), and in the period 1952-54 was a teaching Fellow in chest surgery at New York Medical College. (Ex. A, page 16)

On July 1, 1949, after he had successfully completed a written examination, he was issued a certificate as physician and surgeon in the State of New York, and still holds such certificate. (Ex. A, page 27) He is now employed as a physician by the United States Veterans Administration in Los Angeles, California.

(c)

In February 1953 Petitioner filed an application with the California Board of Medical Examiners for a Class C reciprocity certificate so-called, authorizing him to practice as a physician and surgeon in California. (Ex. B-27) This application was based on the aforementioned certificate granted him by the State

of New York on July 1, 1949, after written examination, and further showed that he had received the degree of Doctor of Medicine from the University of Lausanne in June, 1941, based on studies at that University from March, 1940 through June, 1941, Cambridge University from October, 1938 through June, 1939, Anderson College of Medicine (Glasgow, Scotland) from October, 1937 through June, 1938, and St. Mungo's College of Medicine (Glasgow, Scotland), from October, 1936 through June, 1937. (Ex. B-27)

There was no question as to the completeness of the application and its supporting documents. However it was denied by Respondent Board of Medical Examiners on the ground that two of the schools which Petitioner had attended, namely St. Mungo's College of Medicine, and Anderson College of Medicine, were unapproved by Respondent which also claimed that under its regulations all graduates of foreign schools were obliged to submit to an oral, clinical, and written examination as a prerequisite to reciprocity licensure. Petitioner then requested a full hearing before Respondent Board, which was thereafter held on June 21, 1954, and at which he testified in his own behalf, no witnesses being called by Respondent. (Ex. B-28) On July 1, 1954, Respondent issued its written decision, denying the application. (Ex. B-29) It found in its decision that Petitioner had met all the statutory requirements for the requested certificate, save and except that the portion of his training at the aforementioned Scottish Colleges was not "equivalent" to the requirements of the California Business and Professions Code, and also found that those Colleges were "unapproved" by it, and made the following determination:

> "Respondent's [Petitioner's] application for reciprocity certificate should be denied on the basis that he is a foreign graduate, trained in part in an unapproved school pursuant to the provisions of Section 2193 of the Business and Professions Code of the State of California." (Ex. B-29, pages 4, 5)

It was without issue that the training at Cambridge University and at the University of Lausanne was deemed "approved".

Petitioner thereafter instituted proceedings in the San Francisco Superior Court for a writ of mandate to require Respondent to issue him a reciprocity certificate, and on May 23, 1955, that Court entered the following order:

> "The Court finds that petitioner has not established that he is qualified educationally for a reciprocity certificate, under section 2310 of the Business and Professions Code of the State of California. However, the Court further finds that the petitioner has sufficient educational training and experience to qualify for an examination, under section 2193 of the Business and Professions Code of the State of California. Therefore the Court orders that respondents are to give Petitioner an examination, in accordance with Section 2193 of the Business and Professions Code of the State of California, as required of all graduates of foreign schools, and in the event the Petitioner is successful in passing this examination, to license him as a physician and surgeon in the State of California." (Clerk's transcript filed in District Court of Appeal in 1955, page 66)

On June 21, 1955, Petitioner appealed from that decision to the District Court of Appeal, State of California, First Appellate District, Division One, and on

July 13, 1955, Respondent Board filed a cross-appeal. On November 28, 1956, the Court of Appeal held that the findings in the Order of the Superior Court were conflicting, and remanded the cause for further proceedings. *Akopiantz* v. *Board of Medical Examiners*, 146 C.A. 2d 331, 304 P. 2d 52. (Appendix, pages 15a-21a) On the further trial the Superior Court denied the petition for writ of mandate. This decision was affirmed on Petitioner's appeal to the above District Court of Appeal (Appendix, pages 2a-15a; 190 Advance California Appellate Reports 114), and his petition for rehearing was denied. (Appendix, page 22a)

On May 10, 1961, as reported hereinabove, the Supreme Court of the State of California denied a hearing. (Appendix, page 1a)

STATUTES INVOLVED

As of the date of Petitioner's application for a Class C reciprocity certificate, namely in February, 1953, the following statutes and provisions of the California Business and Professions Code were pertinent:

> "§2165. The provisions of this article shall apply to all certificates *unless the particular provisions applicable to each certificate otherwise provide or specifically cover.*" (Italics supplied) (Ex. B-2, page 18)
>
> "§2190. Every applicant for a physicians and surgeons certificate shall comply with all the provisions of this article . . . *unless the requirement is one applicable to a particular class of applicant for this* [Physician's and Surgeon's] *certificate* (Italics supplied) (Ex. B-2, page 21)
>
> "§2310. The board [of Medical Examiners] shall issue a reciprocity certificate to an applicant to

> practice a system or mode of treating the sick or afflicted in this State that he is authorized to practice in any other State if it is a system or mode that is recognized by this chapter or any preceding practice act. *Subject to the provisions of Sections 2320 and 2321, no examination for any reciprocity certificate shall be required.*" (Italics supplied) (Ex. B-2, page 28)

Section 2320 (Ex. B-2, pages 29, 30) provided for an examination where the Board found that the requirements of the medical licensing authority issuing the certificate upon which the application was based were not equivalent to California standards, or where the applicant had not completed one year's internship. Section 2321 required an oral examination where the out-of-state license was more than 10 years old. Neither of the above exceptions to the no-examination rule was applicable in the cause at bar. The Respondent Board in effect found that the New York requirements equalled those of California, and Petitioner's New York license had been issued to him less than 4 years prior to his California application. However, Respondent Board has established a third exception to the no-examination rule, by requiring examination of all reciprocity applicants graduating from foreign schools, under Section 1330(f), Title 16, California Administrative Code, as follows:

> "Applicants, including those applying for reciprocity upon a license from another state, a certificate issued by the National Board of Medical Examiners, or a commission as a medical officer in the United States Army, Navy, or Public Health Service upon graduation from foreign schools, whose resident professional instruction has been secured in teaching institutions located outside the United States and Canada and whose

> credentials are found sufficient in form by the Credentials Committee and the board [of Medical Examiners], shall be given and *shall successfully take a written oral, and clinical examination suitable and sufficient to indicate the quality and sufficiency of his resident professional instruction.*" (Italics supplied)

The reciprocity applicant must show that he has completed the instruction and training required by a school approved by Respondent Board, and that the standards of the State issuing the certificate upon which his reciprocity application is based were equal to contemporaneous California requirements, respectively under the following Sections of the above Code:

> "§2316.5 An applicant for a reciprocity certificate shall prove that a diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the Board was a condition precedent to his admission to the examination for the license upon which his application for a certificate in this state is based." (Ex. B-2, page 29)

> "He shall submit evidence of his own and from medical licensing authority, which is satisfactory to the Board, and which shows that the requirements of the authority for a certificate permitting him to practice a system or mode of treating the sick and afflicted at the time it was issued, were not in any degree or particular less than those which were required for the issuance of a similar certificate to practice a system or mode of treating the sick and afflicted in this state at the same time." (Ex. B-2, page 29)

As has been noted above, Respondent Board in effect found that the New York requirements equaled those of California.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

In failing affirmatively and formally to approve by resolution even a single foreign medical school (other than Canadian schools), and in failing to establish reasonable standards by which the quality of medical instruction in foreign medical schools could be measured and evaluated, Respondent Board has assumed absolute power to itself to accept or reject on whim or caprice applicants from foreign medical schools, thereby in the instant situation violating Petitioner's constitutional rights under the Fourteenth Amendment of the Constitution of the United States. A statute which operates so as to allow such discrimination against the whole class of foreign medical school graduates is unconstitutional, as was established in *Yick Wo* v. *Hopkins*, 118 U.S. 356. These constitutional issues were raised by Petitioner in his proceedings before the District Court of Appeal, and in his Petition for a hearing by the Supreme Court of California. The District Court of Appeal held that no denial of any constitutional right or discrimination or arbitrary action against Petitioner had been shown (Appendix, pages 11a, 12a) and the Supreme Court thereafter refused a hearing. (Appendix 1a).

According to the District Court of Appeal, Petitioner had to make affirmative showing of approval of all the foreign schools of his attendance, although no such requirement has been exacted from any other foreign school graduate applicant. Actually, the University of Lausanne and Cambridge University, stand approved by Respondent, which in its decision November 4, 1960, *In the Matter of the Statement of*

Issues Against Levon A. Akopiantz found in part as follows:

> "Respondent's education at Cambridge and Lausanne University Medical School was adequate as far as the courses taken at those universities are concerned."

The subject matter of this Petition for Certiorari is important and of national significance because of the large numbers of foreign medical school graduates, American citizens, returning to their homeland each year with expectation and desire to enter into the practice of their profession.

ARGUMENT

On October 19, 1939, which was subsequent to Petitioner's attendance at St. Mungo's College of Medicine and at Anderson College of Medicine, Respondent Board passed a resolution disapproving the "extra-mural" schools of Scotland, and reciting therein that the action was based upon a report submitted to the New York Board of Regents by one Dr. Rappeleye, and was in conformity with similar action taken by the New York Board of Medical Examiners and the National Board of Medical Examiners. A mimeographed, unverified copy of that report (Ex. B-30) was, over objection, placed in evidence at the hearing before Respondent Board on Petitioner's application for the Class C reciprocity certificate. Both of the above Boards of Examiners have ruled that persons who attended the extra-mural schools prior to 1939 were eligible for licensure.

In 1944 the Attorney General of California, in response to inquiry by Respondent Board as to whether

the 1939 resolution would bar persons attending extra-mural schools, wrote:

> "If this doctor was graduated from the school in 1933, prior to the resolution disapproving the extra-mural schools of Scotland, he would be entitled to recognition as a graduate of the school, properly recognized, even though the board at a later date disapproved of the school. Such disapproval of the school would relate only to those doctors graduating after the Board's resolution of disapproval." (Appendix, pages 22a, 23a)

One Howard Golden attended St. Mungo's College of Medicine and Anderson College of Medicine from October 1936 through 1939 (Petitioner attended from October 1, 1936 to June 30, 1938), was graduated from the University of Lausanne on March 24, 1941, (Petitioner was graduated June 27, 1941), and was licensed in New York on written examination on April 15, 1942 (Petitioner was licensed June 1, 1949). (Ex. C-1) On June 6, 1945, Golden wrote Respondent Board, requesting reciprocity application forms and advising that he had attended Anderson College of Medicine. In reply, Dr. Frederick M. Scatena, Secretary-Treasurer of the Board, and Chairman of its Credentials Committee, wrote in part:

> "Anderson College of Medicine was disapproved by this Board on October 19, 1939. If your work was taken before that date, it would be approved." (Ex C-1)

Thereafter and on July 25, 1945, Golden filed his application for a Class C reciprocity certificate, showing therewith attendance at the foregoing two extra-mural schools, graduation from the University of Lau-

sanne, and licensure in New York, all as above indicated.

On November 16, 1945, a reciprocity certificate was issued by Respondent to Golden, reciting in part as follows:

> "This is to certify that Howard Golden, M.D., a graduate of University of Lausanne Faculty of Medicine, Switzerland, on the 24th day of March, 1941, having shown to the satisfaction of this Board that he possesses the qualifications required by law, and having produced a certificate entitling to practice medicine and surgery issued by the New York Board of Medical Examiners on the 15th day of April, 1942, which complies with the requirements of the Business and Professions Code of the State of California relating to practice of medicine and surgery, is hereby granted a Physicians and Surgeons Certificate in this State." (Ex. C-1)

Three days later, namely on November 19, 1945, one Leonard S. Lazeroff filed application with Respondent Board for a Class C reciprocity certificate. His qualifications were similar to Golden's and Petitioner's. He had attended Anderson College of Medicine and St. Mungo's College of Medicine from October 1937 through June, 1939, was graduated from the University of Lausanne after attendance from March 18, 1940 to February 18, 1942, and was licensed in New York on September 8, 1944, after examination. (Ex. C-2)

On January 5, 1946, Dr. Scatena wrote the Attorney General of California a second time, requesting a ruling as to the effect of the Board's 1939 resolution re-

garding the extra-mural schools, and on March 5, 1946, Respondent Board received reply in part as follows:

> "I have your letter of January 5, 1946, concerning graduates of so-called extra-mural schools of Scotland. You present some three questions, the first of which is that of approval or disapproval of such schools. In this connection you state that these schools were disapproved by the Board on October 19, 1939, but that applications now pending involve persons who graduated prior to the latter date.
>
> "It is the view of this office that schools need not be disapproved and that all schools must be actually and affirmatively approved before graduates thereof may be considered for licensure. You are therefore free to consider whether these schools were in fact approved at the time such applicants attended and graduated therefrom. Please understand that in the event these schools were affirmatively approved, such approval would continue until the Board took other action . . ." (Ex. B-33)

Thereafter and on May 7, 1946, Respondent issued a reciprocity certificate to Lazeroff, based upon his "having shown to the satisfaction of [the] Board that he possesses the qualifications required by law." (Ex. C-2)

No further action was taken by Respondent regarding the extra-mural schools until August 8, 1946, when it adopted the following resolution:

> "(a) Regarding extra-mural schools of Scotland.
>
> All extra-mural schools in Scotland be and they are hereby disapproved as of this date. Upon consideration of its past actions on schools, the Board finds that these schools have never been approved by this Board for resident professional

instruction in medicine and surgery, and further finds that said schools were expressly disapproved by this Board as of October 1, 1939."

A list of approved American and Canadian schools was published in the Official Directory but Respondent assumed to make its determinations with respect to foreign schools other than Canadian on a case by case basis, so shown by testimony before the Superior Court of Wallace Thompson, Respondent's Executive Secretary:

"A. The applications . . . are given a preliminary screening by the staff of the Board of Medical Examiners. . . . If it is determined that there is certain information that is readily apparent to the staff of the Board that is lacking in connection with the application the person is advised of what is lacking and is requested to file additional information relative to anything that may be lacking. Then when the application is felt by staff of the Board that it is in a manner that can be considered by the Credentials Committee, whether adversely or in favor of the application, it is put on the list for consideration by the Credentials Committee. Then the applications are reviewed at that time and the determination is made as to whether the person does or does not meet the requirements of the law. . . .

Q. It is a fair statement in summary, Mr. Thompson, that after the Credentials Committee has made its ruling on whether or not the application meets the standard as set out by the Code, that the matter is then sent out to members of the Board for mail vote of approval, and then at the next meeting of the Board at which all Board members are present, the Board at that time ratifies the prior action of the Credentials Committee. Is that a fair statement, sir?

A. I believe it is.

Q. And it is your testimony that at no time to your knowledge, up to and including October of 1949, there was never any list of approved schools —of approved foreign medical schools outside of the United States and Canada?

A. To my knowledge there was no list of approved foreign medical schools.

. . .

Q. . . . You just testified that there was no approved list of foreign schools, and I ask you if it was not the practice of the Board that the Credentials Committee in reviewing these applications from foreign schools would make the determination as to whether or not that credit would be accepted or not?

A. Yes.

Q. They would make that determination?

A. Yes.

Q. And then they would have the Board vote on it by mail and the Board would ratify it at the following meeting?

A. Yes."

(Reporter's Transcript filed in District Court of Appeal October 7, 1959, pages 75-79)

Petitioner does not question the authority of Respondent to prescribe reasonable rules by which to measure the quality of medical instruction given in professional schools, but Respondent never promulgated any standards for approval of schools or for evaluation of the instruction. Its failure to establish standards has left the law and the procedure indefinite, vague, and unfixed, and Respondent, by reason of its such omission, was and is able to approve or disapprove wholly upon whim or caprice. In the cause at bar, Respondent, by its failure to supplement the vague standard of "quality" set forth in the statute with reasonable rules by which quality might be

measured, was able to deal unequally and inequitably with Petitioner as compared with Golden, Lazeroff and others upon the pretext that Petitioner's schooling, in part, was "unapproved" when the same claim was not imposed upon any other foreign medical school graduate. Indeed, in March, 1960, and while this cause was actually pending on appeal, Respondent admitted to examination one Morton Shapiro who obtained all of his medical training in the same extramural schools which Petitioner attended.

A statute which does not operate to prevent the inequality of treatment such as was visited upon Petitioner is unconstitutional, as was established in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 366, 373, in which this Court said in part:

> "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. . . . They seem intended to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons . . . The power to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance or restraint. . . .
>
> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . . The discrimination is therefore illegal, and the public adminis-

> tration which enforces it is a denial of the laws and a violation of the Fourteenth Amendment of the Constitution."

This Court recently held in *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232, 238, 239, 77 S. Ct. 752:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment . . .
>
> "Even in applying permissible standards, officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

It was held in *Aitchison* v. *State,* 105 A. 2d 495, 498, 204 Maryland 538:

> "It is . . . an accepted doctrine that the right to practice medicine is a valuable right of property within the Fourteenth Amendment of the Federal Constitution, guaranteeing due process of law."

And in *Lawrence* v. *Briry, et al, Board of Regulation in Medicine,* 132 N.E. 174, 176, 239 Massachusetts 424:

> "The right to follow a legitimate calling for any lawful purpose is sacred and is protected both by the Constitution of the United States and that of this Commonwealth. The right of a physician to toil in his profession as that of other citizens is both liberty and property, partaking of the nature of each, and is guaranteed by constitutional mandate from unwarrantable interference. U.S. Constitution, Art. 14 of Amendments."

CONCLUSION

Wherefore certiorari should be granted to review the Order of the Supreme Court of California, entered May 10, 1961, without opinion (Appendix, page 1a), denying Petitioner's Petition for a hearing after decision March 15, 1961, by the District Court of Appeal, State of California, First Appellate District, Division One and numbered 1 Civil No. 19,018, in which decision (Appendix, pages 2a-14a) it was held that Petitioner's constitutional rights had not been violated (Appendix, pages 11a, 12a), the issue having been presented in Petitioner's Petition to the Supreme Court of California for a hearing.

Respectfully submitted,

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APPENDIX

ORDER DUE

May 12, 1961

Order Denying Hearing

(Filed May 10, 1961)

After Judgment by District Court of Appeal
1st District, Division 1, Civ. No. 19018

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

AKOPIANTZ,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA.

Appellant's petition for hearing DENIED.

GIBSON,
Chief Justice.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 31st day of August, A. D. 1961.

WILLIAM L. SULLIVAN,
Clerk.

By HARRY M. GAIDISER,
Chief Deputy Clerk.

(SEAL)

(Vol. 190 A.C.A. 114.)

IN THE DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION ONE

---

1 Civil No. 19,018
LEVON A. AKOPIANTZ,
Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

Opinion

Petitioner appeals from a judgment denying his petition for writ of mandate to compel the Board of Medical Examiners to issue to him without an examination a reciprocity certificate to practice as a physician and surgeon. Petitioner also purports to appeal from the order denying new trial.[1]

QUESTIONS PRESENTED

1. Did Petitioner meet all statutory requirements?

2. Has petitioner been denied the constitutional guarantees of due process and equal protection of the law?

---

[1] As we have held, time after time, that an order denying new trial is reviewable on appeal from the judgment, and that such order is not appealable, the purported appeal from the order must be dismissed.

3. Should approval of the schools attended by petitioner be ordered?

4. Did the court err in denying a motion for new trial?

Record

In February, 1953, petitioner filed an application with the board for a reciprocity certificate without an examination, authorizing him to practice as a physician and surgeon under the laws of this state, and directing the board to approve retroactively St. Mungo's College Medical School and Anderson College of Medicine. His application was based upon a license granted him by the State of New York in July 1949, after he had successfully passed a written examination there. The application further showed that the applicant had received the degree of Doctor of Medicine from the University of Lausanne (Switzerland) in July 1941, based on his studies at Lausanne from March 1940, through July 1941; Cambridge University (England) from October 1938, through June 1939; St. Mungo's College Medical School (Glasgow, Scotland) from October 1936, through June 1937; and Anderson College of Medicine (Glasgow, Scotland) from October 1936, through June 1938.[2] The application was rejected by the board upon the ground that two of the schools which petitioner attended (St. Mungo's and Anderson) were unapproved by the board. Also the board claimed that under its regulations all graduates of foreign schools must submit to an oral, clinical, and written examination as a prerequisite to reciprocity licensure. Dr. Akopiantz then requested a hearing before the full board, which was held on June 21, 1954. At the hearing Dr. Akopiantz testified in his own behalf; no witnesses were called by the board. On July 1, 1954, the board issued its written decision, denying the application. In its decision the board found that Dr. Akopiantz met all

[2] Since graduating from Lausanne, petitioner's medical record is an impressive one. Unfortunately such fact does not offset the requirements of the statute.

of the statutory requirements for issuance of the requested certificate, save and except that the portion of his training received at St. Mungo's College Medical School and Anderson College of Medicine in Glasgow, Scotland, was not "equivalent to the requirements of articles 4 and 5, chapter 5, division 2, of the Business and Professions Code, and further, that said schools were "unapproved" by the Board of Medical Examiners.

Thereafter petitioner petitioned the superior court for a writ of mandate directing the board to issue him a reciprocity certificate. The court, after a hearing, denied the petition. On appeal, this court found that the court's findings were conflicting and remanded the cause for further proceedings. (*Akopiantz* v. *Board of Medical Examiners*, 146 Cal.App.2d 331 [304 P.2d 52].) On the further trial, the superior court entered judgment denying the petition for writ of mandate.

1. *Petitioner Did Not Meet All Statutory Requirements.*

In our decision in 146 Cal.App2d. 331, we held that in order to be entitled to a reciprocity certificate without taking a written examination, the applicant must have met two requirements, the failure to meet either of which would make him disqualified to receive the certificate: (1) He must have attended for the prescribed period a school or schools approved by the board; and (2) the resident instruction received at such foreign schools must be equivalent to that required by sections 2190-2195, Business and Professions Code. As we there said: "Even if the court were to determine that the foreign schools have been approved by the board, the board would have no authority to issue the requested reciprocity certificate if the court determines that the evidence supports the board's finding that the foreign instruction was not the 'equivalent' of California requirements." (P. 334.) This is the law of the case. (See *Allen* v. *California Mutual B. & L. Assn.*, 22 Cal.2d 474, 481 [139 P.2d 321]; *Gore* v. *Bingaman*, 20 Cal.2d 118, 121 [124 P.2d 17].)

The burden of proving the "equivalent" was on the petitioner. (*Mann* v. *Board of Medical Examiners*, 31 Cal.2d 30, 39 [187 P.2d 1]; *Arwine* v. *Board of Medical Examiners*, 151 Cal. 499 [91 P. 319].) The duty of the trial court was not to reweigh the evidence before the board, but to determine from a review of the record whether there is sufficient evidence to sustain the ruling of the board. (*Akopiantz v. Board of Medical Examiners*, *supra*, 146 Cal.App.2d at p. 334, f.n. 4.)

The trial court found that the findings of the board were supported by the evidence and that although petitioner completed "quantitatively, partly at an approved school *and partly at unapproved schools*, the total number of units, and in the proportion thereof, required by Section 2192 of the Business and Professions Code" (emphasis added), it was not shown that "the resident professional instruction" received by petitioner "was in all respects equivalent in quality, standard, and excellence to the minimum requirements specified in Articles 4 and 5, Chapter 5, Division 2 of said Code . . . "

Section 2316.5, Business and Professions Code, provides: "An applicant for a reciprocity certificate shall prove that a diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the board was a condition precedent to his admission to the examination for the license upon which his application for a certificate in this State is based."

The schools which petitioner attended, which attendance was necessary to meet the quantitative requirements of the code, and which were not approved by the board, are St. Mungo's College Medical School, the Anderson College of Medicine (these schools are referred to as "extra-mural schools" of Scotland), and the University of Lausanne (Switzerland). It is conceded that no formal recognition of these schools has ever been made by the board. The board's minutes of October 19, 1939, showed that a report of the college investigation committee was adopted which stated that

the extra-mural schools were operating under standards far below those of the regularly approved medical schools of Great Britain and the United States of America. The committee recommended that it be the policy of the board to deny any application based upon medical credits from those schools. The resolution stated that the recommendation was based in part on a report by Dr. Rappleye, Dean of Columbia University, College of Physicians and Surgeons, and adopted by the medical licensing authorities of the state of New York. It further stated that a similar resolution had been adopted by the National Board of Medical Examiners.

On June 9, 1946, the board's minutes show that a motion disapproving all extramural schools of Scotland "as of October, 1939," and finding that the board's records disclose that these schools never had been approved, was adopted. On August 8, 1946, a similar resolution was adopted.

Petitioner contends, however, that the board had indirectly approved these schools and nullified said resolutions because it granted a reciprocity license without examination in 1945 to one Dr. Golden and in 1946 to one Dr. Lazaroff, both of whose medical instruction records had included attendance at the two schools in question. That these two instances did not constitute a nullification of said resolution or an approval of these schools is well illustrated by *Mann v. Board of Medical Examiners, supra,* 31 Cal.2d 308. There the board had disapproved the Chicago Medical School. Mann claimed that his attendance at that school should be considered on his application for a reciprocity license because, since its disapproval of the school, the board had granted licenses to nine graduates thereof. The court said: "It is apparent that the action of the board . . . does not show such a consistent course of admission of graduates of the school as to establish a de facto or qualified approval. It shows only isolated cases of admission, for the most part under exceptional circumstances. The formal and deliberate action of the board in disapproving the school could not be

nullified by less formal or deliberate action, nor could nullification be established except by the strongest kind of showing, clear, convincing, and unequivocal." (P. 39.)

Petitioner attempts to avoid the application of the Mann case on the ground that the disapproval of the Chicago Medical School occurred prior to Mann's attendance there, whereas the disapproval of the extramural schools occurred after petitioner's graduation therefrom. This is a distinction without a difference.

Moreover, in *Herzig* v. *Board of Medical Examiners* (1933), 135 Cal.App. 41 [26 P.2d 513], it was held that the board did not abuse the discretion vested in it by denying a reciprocity license without examination to a petitioner who graduated from two certain American medical schools prior to the adoption by the board of a resolution refusing to recognize those institutions, and even though the board had granted, after the adoption of the resolution, reciprocity certificates to holders of diplomas from those same schools.

Moreover, this contention was determined against petitioner in the prior Akopiantz case.

Petitioner also attempts to distinguish the Mann case by contending that the admission of the other doctors might have been in error, while here the board's Credentials Committee plainly noted that it was recommending issuance of licenses to Doctors Golden and Lazaroff because they had completed thier work prior to 1939, the date of the board's disapproval, and the committee seemed to believe that attendance at these schools prior to their formal disapproval entitled the applicants to certificates. Also the board had an attorney general's opinion that the resolution disapproving the extramural schools did not have a retroactive effect. Obviously the committee and the attorney general were mistaken. The fact is, as found by the second and third resolutions of the board, that the extramural schools had never been approved by the board. However, whether by mistake or otherwise, we are not compelled to the conclusion that the admission of Doctors Golden and Lazaroff constituted the clear and unequivocal

action which the Mann case holds is necessary to nullify the formal resolution of the board. This is true even though the secretary-treasurer of the board wrote a letter to Dr. Golden informing him that his work at Anderson College prior to October 19, 1939, would be approved. This court as well as the trial court, must sustain the board's action if there is substantial evidence to support its conclusions. (*See Akopiantz* v. *Board of Medical Examiners*, *supra*, 146 Cal.App.2d at p. 334, f.n. 4.)

There is substantial evidence to show that the 1939 disapproval was not set aside by the admission to practice of the two doctors. At all times the Medical Practice Act has required the affirmative approval of schools in order to qualify their graduates for licensure in California.

Assuming that such action did nullify the 1939 resolution does not help petitioner. On August 8, 1946, after the granting of licenses to the two doctors and prior to petitioner's application, the board adopted a new resolution expressly disapproving the extramural schools. Thus, it clearly appears that petitioner has not met the first requirement laid down in 146 Cal.App.2d at page 333, that on July 1, 1949, when he applied for a license in New York, his medical schools must have been approved by the board.

It appears that it was the practice of the medical board prior to 1939 to issue lists of approved American medical schools, but no formal approval of foreign schools or any list of approved foreign schools was made. All applications for licenses were referred to the board's Credentials Committee, which made the determination even with reference to graduates of foreign schools, as to whether the applicant had the qualifications required by the code. The recommendation of the committee was made to the board, which by vote ratified the recommendations of the committee. This practice did not necessarily constitute an approval of the schools from which the applicants who were granted licenses may have graduated. The lack of approval of the extramural schools alone is

sufficient to justify the denial of petitioner's application.

Nor has petitioner sustained the burden of proving the second requirement set forth in the prior Akopiantz case, namely, that the instruction he received at those schools be the equivalent of that required by sections 2190-2195 of the Business and Professions Code. Petitioner has the burden of proving the equivalence. (*Mann* v. *Board of Medical Examiners*, *supra*, at p. 40.) Section 2316, Business and Professions Code, demands that the requirements of the college attended by the petitioner shall not have been "in any degree or particular less than" California's own requirements.

The board had before it the report of Dr. Rappleye who inspected the extramural schools in November 1938. The conclusions in his report were that the facilities were inadequate, classes too large, training mostly didactic rather than functional, inadequate numbers of cadavers and no quarters for animals. Most of the instructors were active practitioners who were paid on the basis of the number of students they taught rather than on any salary basis, and were not men specifically qualified in the sciences. According to the report, everyone connected with the approved universities and medical schools was of the opinion that these extramural schools maintained standards below those of the qualified university and medical schools and should be discontinued.

Petitioner states that he testified as an expert before the board to the effect that the instruction he had received was equivalent to the required instruction. He then argues that his testimony was binding on the board, and must prevail over the Rappleye report. The trier of the fact is the exclusive judge of the credibility of witnesses and may reject *in toto* even uncontradicted evidence by taking into consideration the bias and motive of the person testifying. (*Odenthal* v. *Lee* (1952), 113 Cal.App.2d 666, 669 [248 P.2d 937]; *Beeler* v. *Plastic Stamping, Inc.* (1956), 144 Cal.App.2d 306, 308 [300 P.2d 852].) Moreover, there

was testimony given by petitioner himself which showed the calibre of the extramural schools, e.g., the schools did not have extensive research facilities, the students only took examinations at the end of the course rather than every four or six weeks, and most importantly that his instruction at Lausanne was at an extremely accelerated pace. On the basis of the last evidence alone the board in its discretion could reasonably have concluded that because the petitioner purported to take same 3,743 hours' study in a period of 52 weeks at Lausanne the quality of the medical instruction obtained by petitioner was not up to the standards of instruction in this country and Canada.

Petitioner contends that he is entitled to a reciprocity license because he was licensed to practice medicine by the New York authorities July 1, 1949. Section 2316 requires not only that the requirements of the college be the equivalent of those required in this state but also that the requirements of the medical licensing authority (the State of New York) be the equivalent of those required here at the time of the issuance of the certificate by the other state. Obviously the Legislature in providing for the issuance of reciprocity licenses, without further examination, intended that the applicant show that he had the requisite instruction in both quantity and quality, and if the applicant relied upon a medical license from another state, he must show that in taking the examination in the other state he then had the qualifications which would have permitted him to take an examination here. Admission to practice in another state does not *per se* qualify for a reciprocity license in California. Sections 2316 and 2317 are clear that the controlling date is the date when the applicant was issued a license in the other state. On July 1, 1949, petitioner could not have qualified to take an examination for a medical license in California. At that time section 2193 required that to take the examination the applicant must have taken the required medical training in

and had graduated from an approved school.[3] Not only were the extramural schools then and now not approved by the board but the University of Cambridge and the University of Lausanne likewise were not approved. Thus it appears that the New York standards in July 1949, were not the equivalent of the California standards at that time.

Petitioner urges that because California has granted reciprocity to a number of licentiates of the State of New York it thereby recognizes that the standards of New York are comparable to those of California. This result does not necessarily follow. The board is free to determine in each instance whether the applicant can meet the requirements of California and even if it has disregarded, in any instance, the law's requirement that the instruction received by the applicant must have been equivalent to that which would have entitled him to take an examination here, such fact would not permit the board to continue such a mistake nor to disregard the express requirement of equivalence prescribed by law. (See *Mann* v. *Board of Medical Examiners*, *supra*, 31 Cal.2d 30; *Herzig* v. *Board of Medical Examiners*, *supra*, 135 Cal.App.2d 41; *Arwine* v. *Board of Examiners*, *supra*, 151 Cal. 499, 502.)

2. *Due Process and Equal Protection of the Law.*

In Mann, *supra*, the same argument was made as by petitioner here, that because the board had admitted to practice graduates of the same schools attended by petitioner and had denied him admission to practice, his constitutional rights have been violated. In Mann the court said (p. 41): "No denial of any constitutional right or discrimination or arbitrary action against petitioner is shown. The plenary power of the state to regulate the practice of medicine is not denied (41 Am.Jur. § 37, p. 166; *In re Ad-*

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[3] Effective October 1, 1949, section 2193 was amended eliminating the requirement that for an examination the applicant's school must have been approved here. However, this amendment was not in effect when petitioner obtained his New York license.

mission to Practice Law, 1 Cal.2d 61, 67 [33 P.2d 829]; *Rosenblatt* v. *California State Board of Pharmacy*, 69 Cal. App.2d 69 [158 P.2d 199]). In the year 1945, even if the Board had not theretofore changed its administrative practice, it would have been powerless to admit a graduate of an unapproved school by reciprocity, with or without examination. This is the unmistakable import of the statutes added to the code in 1943 (§§ 2168.5, 2316.5, *supra*), and the board has so construed and followed them. Section 2168.5 requires 'every applicant' to prove completion of instruction in an approved school, and section 2316.5 declares that such instruction must not only be proved but it must also be shown to have been a 'condition precedent' to the applicant's admission to examination for the license upon which his reciprocity application in this state is based. Petitioner's Illinois license, upon which he based his application for reciprocity, was not procured upon a showing of graduation from an approved school."

3. *Should the court order approval of the schools attended by petitioner? No.*

Section 2173, Business and Professions Code, provides: "The board shall approve every school which complies with the requirements of this chapter for resident courses of professional instruction . . . Nothing in this chapter prohibits the board from considering the quality of the resident courses of professional instruction required." As we have heretofore shown, the unapproved schools have not complied with the requirements of the chapter, and hence are not qualified to be approved.

4. *Denial of motion for new trial.*

Petitioner moved for a new trial, principally on the ground of newly discovered evidence, which he contends required that the court open the case for referral back to the board under the provisions of section 1094.5, Code of Civil Procedure. That section provides that when it appears that there is relevant evidence which, with the exercise of

reasonable diligence, could not have been presented to the administrative agency, the matter should be referred back to the agency for reconsideration in the light of such evidence.

The affidavit of counsel filed in support of the motion discloses that prior to the board hearing petitioner attempted to secure the testimony of Doctors Golden and Lazaroff, but that the same were most uncooperative because of fear of possible retaliation by the board. Counsel, then, after the hearing, located Dr. Leo Fred, a professor of medicine at University of California at Los Angeles Medical School. Dr. Fred first agreed to testify, but then refused on the advice of his counsel, who stated that petitioner was *persona non grata* to the board because of the extended litigation over his licensure.

Finally, petitioner was able to locate Dr. Charles Storch, a New York licensee and graduate of the extramural schools. Dr. Storch's affidavit contains testimony relevant to the issue of the quality of medical education offered in the extramural schools.

It is well-settled that an appellate court rarely interferes with the decision of a trial court on a motion for a new trial on the grounds of newly discovered evidence and that the exercise of the court's discretion in granting or denying a motion for a new trial on that ground should not be disturbed except in a case of manifest abuse. (*Teixeira* v. *Domingos*, 151 Cal.App. 2d 380, 384 [311 P.2d 634].)

Coupled with this well-settled principle is the policy of the law that the claim of newly discovered evidence as a ground for a new trial is uniformly looked on by the courts with distrust and disfavor. It is said that public policy requires a litigant to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. (*People* v. *Loar*, 165 Cal.App.2d 765, 777 [333 P.2d 49].)

The original application of the petitioner for a license was made in February 1953, and the hearing before the Board of Medical Examiners was held on June 21, 1954.

The original proceedings in the superior court took place from September 3, 1954, until notice of appeal was filed on June 17, 1955. The decision of the District Court of Appeal setting forth the issues to be determined in the retrial in the superior court was announced on November 28, 1956. It was not until one year later that petitioner with full knowledge of the issues which he had to meet in the superior court, filed a motion to set the cause for trial. The petitioner subpoenaed only one witness. Apparently during all of this time the petitioner had not been attempting diligently to secure the testimony of other doctors and other expert witnesses and it was only when the decision went against him that he attempted to obtain some relevant evidence which would form the basis of the court's granting a new trial. Certainly such lack of diligence is patently evident and no contention can seriously be made that the trial court abused its discretion in failing to grant the motion for a new trial.

The purported appeal from the order denying new trial is dismissed. The judgment is affirmed.

Bray, P. J.

Tobriner, J., and Duniway, J., concurred.

Filed March 15, 1961.

Lawrence R. Elkington, Clerk.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

No. 16962

LEVON A. AKOPIANTZ,
Petitioner, Appellant and Respondent,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent, Appellant and Respondent.

Opinion

After the denial of his application to the respondent board of medical examiners for a reciprocity physician and surgeon certificate without examination,* Dr. Levon A. Akopiantz petitioned the board for a hearing to determine that New York's medical licensing requirements were not less than those of California on July 1, 1949, the date his New York license was issued.

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* He bases his claim upon the fact that on July 1, 1949, the State of New York admitted him to practice upon successful completion of an examination. He received his medical degree at the University of Lausanne, Switzerland, in June, 1941. Lausanne gave him credit for 2432 hours of training elsewhere, including 1251 hours at two schools in Scotland, St. Mungo's College Medical School (October, 1936, to June 30, 1937) and the Anderson College of Medicine (October, 1937, to June, 1938).

Our reciprocity statute applies if the applicant "is authorized to practice in any other state if it is a system or mode that is recognized by this chapter [Ch. 5 of Div. 2 of the Business and Professions Code, §§ 2000-2497] . . ." It declares that "[s]ubject to the provisions of section 2320 and 2321, no examination for any reciprocity certificate shall be required." (Bus. & Prof. Code, § 2310.) Specific requirements are imposed by several sections of said Chapter 5, particularly including sections 2316, 2316.5, 2317, 2192 and 2193 of the code.

Upon filing this petition Akopiantz requested a hearing on June 21, 1954, and waived the issuance of the statement of issues prescribed by section 11504 of the Government Code. Upon the hearing, which was held on the date requested, he stipulated that "a hearing may be granted on the petition in lieu of a formal statement of issues."

We look, therefore, to the petition and there find, among others, certain significant issues stated in the form of the following averments: (1) Akopiantz' resident professional instruction equaled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects equivalent to those stated in section 2192 of the Business and Professions Code, and were equvalent in quality, standard and excellence to the minimum requirements specfied in Articles 4 and 5 (§§ 2165-2195) of Ch. 5 of Div. 2 of said code; (2) the California State Board of Medical Examiners has determined the equivalence of the requirements of the New York licensing authority, with respect to professional instruction in the schools of medicine which petitioner attended, for the purpose of issuing (and did issue) reciprocity certificates to Howard Golden and Leonard S. Lazaroff in 1945 and 1946, respectively.

These allegations, it is apparent, were designed to meet the requirements of section 2193 of the Business and Professions Code as it read on the day * (July 1, 1949) petitioner received his New York license: "An applicant, whose application is based on a diploma issued to him by a foreign medical school *approved* by the board, except a Canadian school, shall furnish documentary evidence, satisfactory to the board, that: (a) He has completed a resident course of professional instruction in an *approved* medical school or schools *equivalent* to that required in this article [§§ 2190-2195] for a physician and surgeon applicant." (Emphasis added.) These were basic Cali-

* See section 2193 as amended by Stats. 1941, ch. 751, p. 2287. The 1949 amendment of this section (Stats. 1949, ch. 530, p. 930) did not take effect until October 1 of that year.

fornia requirements for a foreign medical school graduate who applied for examination in this state on July 1, 1949. They were made applicable to Akopiantz' request for a reciprocity certificate (without examination) by the provisions of sections 2316, 2316.5, 2317 and 2320 of the Business and Professions Code.

The respondent medical board found: (1) "It has not been shown that said resident professional instruction described . . . in Finding . . . III * hereof equaled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects of instruction equivalent to those stated . . . in Section 2192 of the Business and Professions Code and were in all respects equivalent in quality, standard, and excellence to the minimum requirements specified in Articles 4 and 5, Chapter 5 [§§ 2165-2195], Division 2 of said Code." (Finding IV); and (2) that "credit given at St. Mungo's College Medical School and the Anderson College of Medicine hereinabove referred to in Finding III, was for work completed in extramural medical schools, which are schools unapproved by the Board of Medical Examiners of the State of California. Extramural schools were expressly disapproved by the Board of Medical Examiners of the State of California as of the date of October 1, 1939." (Finding VII.)

Thus, it happens that the board found against Akopiantz upon the two major issues. Either finding, unless un-

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* In Finding III the board found that New York admitted applicant to its examination upon proof of completion of four resident courses aggregating in excess of 4000 hours (etc.) from the University of Lausanne and that he was admitted to advanced standing at Lausanne upon a showing of attendance at resident courses at the following medical schools for the periods indicated:

University of Cambridge	10/1/38 to 6/30/39
St. Mungo's College Medical School	10/1/36 to 6/30/37
Anderson College of Medicine	10/1/37 to 6/30/38
Western Infirmary	April to June, 1938.

supported by substantial evidence in the light of the whole record, would support the denial of his request for a reciprocity certificate without examination. The board used only one of them. In its "determination of the issues" it said merely that the "application for a reciprocity certificate should be denied on the basis that he is a foreign graduate, trained in part in an unapproved school pursuant to the provisions of Section 2193 of the Business and Professions Code . . ." Then followed the "order", expressly denying the application for a reciprocity certificate without specifying the reason or reasons for the denial.

The conclusion seems inescapable that the board denied the application solely upon the ground that the St. Miago's and Anderson schools were "unapproved," not upon the ground that the resident instruction received at the foreign medical schools was not the "equivalent" of that required by sections 2190-2195 of our code.

However, both findings are material to the inquiry in this proceeding. Even if the court were to determine that the foreign schools have been approved by the board, the board would have no authority to issue the requested reciprocity certificate if the court determines that the evidence supports the board's finding that the foreign instruction was not the "equivalent" of California requirements.*

The trial court made two findings:

(1) That the applicant "has not established that he is qualified educationally for a reciprocity certificate, un-

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* When, as in this case, the administrative action under review is the denial of a permit, license or certificate (as distinguished from the suspension or revocation of a permit, license or certificate previously granted), "the trial court should not reweigh the evidence, and its sole function is to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board." (*So. Cal. Jockey Club v. Cal. etc. Racing Bd.*, 36 Cal. 2d 167, 175. See also *McDonough* v. *Goodcell*, 13 Cal. 2d 741, 746-749.)

der section 2310 of the Business and Professions Code"; and

(2) That the "petitioner has sufficient educational training and experience to qualify for an examination under" section 2193. Upon the basis of finding No. 2, the court directed the board to give Akopiantz an examination under section 2193 of the code and, if he passes, to license him as a physician and surgeon in this state.

These findings seem inconsistent; irreconcilably so. One says the applicant has not shown he is "qualified educationally" for a reciprocity certificate; the other, that he has sufficient "educational training and experience to qualify" for the examination. In either case the educational requirement (resident instruction "equivalent" to California requirements) is identical, the only difference being that if Akopiantz were applying to take the examination he need not show his foreign schools were "approved" by the board.*

Each of these findings should be read in the light of the only type and quality of education that was involved, a "resident course of professional instruction" at a "medical school,"—a course "equivalent to that required" by our statute "for a physician and surgeon applicant" (§ 2193).

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*Section 2193, which specifically applies to a foreign school graduate seeking a California examination, was amended in 1949, effective October 1, 1949 (Stats. 1949, ch. 530, p. 930), to delete the former requirement that the school or schools be "approved," but to retain the requirement that the applicant "furnish documentary evidence, satisfactory to the board that: (a) He has completed in a medical school or schools a resident course of professional instruction equivalent to that required in this article for a physician and surgeon applicant."

The Legislature gave emphasis to this requirement by inserting this clause toward the end of the section: "Nothing contained in this section shall prohibit the board from disapproving any foreign medical school nor from denying the application if, in the opinion of the board, the instruction received by the applicant or the courses were not equivalent to that required in this article for a physician and surgeon applicant."

As thus read, one finding says that the applicant's foreign school instruction was equivalent; the other, that it was not. Both can not stand. Each cancels the other out, leaving no support for the order appealed from or any part of it.

The board, which has appealed from that part of the order which directs that an examination be given (Akopiantz has appealed from the whole of the order) would have us interpret finding No. 2 as determing that Akopiantz' training and experience in residence at certain hospitals in this country after graduation at Lausanne, when added to his foreign school instruction, measure up to the requirements of section 2193. We do not find a satisfactory basis for such an interpretation. Under any theory the possibility remains that the second finding deals with the same type of instruction as the first and thus leaves the findings in such a state of uncertainty as to furnish inadequate support for the order or any part of it. *

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* The question of Akopiantz' right to take the examination does not appear to be a matter for judicial determination in this proceeding.

It would become such under section 2174, Business and Professions Code, only if he had applied for an examination and the board had rejected it. It does not appear that the board has as yet rejected such an application.

In his petition to the board Akopiantz specifically sought a reciprocity certificate without examination.

The prayer of the petition asked for that and, though it also asked for "such other relief as may be meet and proper," our examination of the transcript of the hearing before the board does not indicate that at the hearing Akopiantz expressed a desire for an examination. These facts and the silence of the board's decision on this subject indicate that the board was unaware of the possibility that the petition might embrace a request for an examination.

This would not prevent the court from referring back to the board the question of Akopiantz' eligibility to take the examination should it appear upon a new trial meet and proper to do so.

The fact that the court's finding No. 2 was outside the issues does not, of course, remove that finding from the record nor resolve the conflict between it and finding No. 1.

If this case is again tried, the present difficulty can be avoided if the trial court will couch its findings in specific terms; e.g., by declaring as to each significant finding of the board (clearly identified by subject matter or paragraph number) that it is, or is not, supported by substantial evidence in the light of the whole record.

We do not undertake to further define the issues upon a new trial but do state that, as concerns the review of the board's disapproval of the medical schools Akopiantz attended, this may be treated as a proceeding under section 2174 of the Business and Professions Code. (See Mann v. Board of Medical Examiners, 31 Cal. 2d 30, 41-42.)

The order is reversed and the cause remanded for such further proceedings as may not be inconsistent with the views herein expressed, each party to bear his own costs of appeal.

FRED B. WOOD, J.

WE CONCURR:

PETERS, P. J.
BRAY, J.

* * * * * * * * * * *

DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION ONE

No. 19018

LEVON A. AKOPIANTZ,
Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

BY THE COURT:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated April 12, 1961

BRAY, P. J.

(SEAL)

* * * * * * * * * *

STATE OF CALIFORNIA
SAN FRANCISCO 2

INTER-DEPARTMENTAL COMMUNICATION

File No.
Date: 10/10/44

To:
Fred N. Scatena, M.D.
Secretary-Treasurer
Board of Medical Examiners
Sacramento

Subject: N. I. Segall, M.D.
Royal College of Edinburgh

From:
Department of Justice:

In acknowledging your letter of October 4, 1944, relative to the above, where you state that the Board in 1933 passed a resolution disapproving the extra-mural schools of Scotland, among them being the Royal College of Physicians of Edinburgh, Scotland. You ask what the status of the school would be in view of the resolution passed in 1939.

You have received an inquiry from a doctor who was graduated from this school in 1933.

If this doctor was graduated from the school in 1933, prior to the resolution disapproving the extra-mural schools of Scotland, he would be entitled to recognition as a graduate of the school, properly recognized, even though the board at a later date disapproved of the school. Such disapproval of the school would relate only to those doctors graduating after the Board's resolution of disapproval.

ROBERT W. KENNY,
Attorney General.

By (Signature)
CARL W. WYNKOOP,
Deputy.

(SEAL)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. .....

LEVON A. AKOPIANTZ,

Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 7th, 1961.

(S) WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 7th day of August, 1961.

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